74-276

Supreme Court, U. S.
FILED
SEP 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No.

NATIONAL ROOFING CONTRACTORS ASSOCIATION, *et al.*,

*Petitioners,*

v.

PETER J. BRENNAN, SECRETARY OF LABOR,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 13, 1974

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners National Roofing Contractors Association, Circle Roofing Company, De Vries Roofing & Siding Company, Palisade Roofing Co., and Henry Reuter Sons, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 30, 1974.

## OPINION BELOW

The opinion of the Court of Appeals, Circuit Judge Pell dissenting, which has not yet been reported, appears in the Appendix hereto. The order of the Secretary of Labor on review in the Court of Appeals, published at 37 Fed. Reg. 24712, is also reprinted in the Appendix.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 30, 1974. A timely petition for rehearing *en banc* was denied on June 21, 1974, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the safety regulation found at 29 C.F.R. § 1926.451(u)(3) (1974) is void for failure of the Secretary of Labor to afford employers affected by the regulation the representation on the Advisory Committee appointed by the Secretary which is required by 29 U.S.C. § 656(b) and regulations promulgated by the Secretary.

2. Whether such safety regulation is void for its denial to petitioners of due process and equal protection of the law because a more lenient standard is

imposed on employers outside the construction industry and because it is impossible to ascertain what is necessary to comply with the regulation.

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§651 *et. seq.* (1970), is reprinted in its entirety in the Appendix.

*Code of Federal Regulations, Part 29:*

§1926.451 Scaffolding.

(u) Roofing Brackets.

(3) A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to eaves with a slope greater than 4 inches in 12 inches without a parapet. In width, the platform shall extend 2 feet beyond the protection of the eaves and shall be provided with a guardrail, midrail, and toeboard. This provision shall not apply where employees engaged in work upon such roofs are protected by a safety belt attached to a lifeline.

## STATEMENT OF THE CASE

This petition involves the review of a standard promulgated by rule by the Secretary of Labor (hereinafter Secretary) under authority granted in the Occupational Safety and Health Act of 1970 (herein-

after OSHA or the Act), 84 Stat. 1590, 29 U.S.C. §§ 651, *et. seq.* (1970). This is the first case to reach this Court which deals with the authority of the Secretary in promulgating occupational safety and health standards under OSHA. It involves questions of law vital to all employers affected by the far-reaching authority granted to the Secretary under this novel law which the three-judge district court in *Lance Roofing Company, Inc. v. Hodgson*, 343 F. Supp. 685 (N.D. Ga. 1972), *aff'd*, 409 U.S. 679 (1972), characterized as a "seemingly unique piece of legislation". *Id.* at 687.[1]

The predecessor of the standard under review herein, 29 C.F.R. § 1926.451(u)(3) [formerly 29 C.F.R. § 1518.451(u)(3)], was adopted by the Secretary pursuant to Section 6(a) of OSHA, 29 U.S.C. § 655(a) (1970), as an established federal standard promulgated under the Construction Safety Act, 40 U.S.C. § 333 (1970), on April 24, 1971.

Section 7(b) of OSHA, 29 U.S.C. § 656(b) (1970), provides that an advisory committee may be appointed to assist the Secretary in his standards-setting functions under Section 6, 29 U.S.C. § 655 (1970). Such a committee "shall include among its members an equal

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[1]The constitutionality of the enforcement procedures of the Act are being challenged in a series of cases presently pending in the Courts of Appeals, *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, et al.*, Docket No. 73-2249 (5th Cir.); *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission, et al.*, Docket No. 73-1765 (3rd Cir.); *Beall Construction Company v. Occupational Safety and Health Review Commission, et al.*, Docket No. 74-1297 (8th Cir.); and *Dan J. Sheehan Company v. Occupational Safety and Health Review Commission, et al.*, Docket No. 74-2764 (5th Cir.).

number of persons qualified by *experience and affiliation* to present the viewpoint of the *employers involved*, and of persons similarly qualified to present the view point of workers involved. . . ." (emphasis added). The Secretary has promulgated regulations which contain the same requirements 29 C.F.R. § 1912.11 (1972).

When the standard under review was proposed, under consideration, and eventually promulgated, no advisory committee had been established pursuant to § 7(b). However, a similar committee had been established under Section 1(e) of the Construction Safety Act of 1969, 40 U.S.C. § 333(e) (1970), and the Secretary had declared in a published rule that when safety and health standards for construction activities were proposed under OSHA, the advisory committee established pursuant to the Construction Safety Act would be consulted, in lieu of establishing a new advisory committee under § 7(b) of OSHA. 36 Fed. Reg. 25229.

There were no representatives of the only persons affected by the "construction industry" catch platform standard, 29 C.F.R. § 1926.451(u)(3), roofing subcontractors, on the Construction Safety Advisory Committee at the time it took effective action recommending the change in the standard ultimately adopted. In a meeting of the committee on April 5, 1972, the Secretary proposed an amendment to change the minimum height above which safety devices would be required by the regulation, from "10 feet" to "20 feet", the latter being the same requirement imposed in the virtually identical "general industry" regulation, 29 C.F.R. 1910.28(s)(3). (April 5, 1972, Advisory Comm.

Tr. 76). As of this meeting of the committee, at which the committee rejected the Secretary's proposed amendment and recommended instead changing "10 feet" to "16 feet" (April 5, 1972, Adv. Comm. Tr. 97), the membership of the committee consisted of representatives of general contractors, labor unions and states and the public at large.

By rule promulgated April 27, 1972, published on May 2, 1972, at 37 F.R. 8873, effective July 1, 1972, the Secretary increased the size of the Construction Safety Advisory Committee to fifteen (15) members. 29 C.F.R. § 1912.20 (1972). Again the employer membership of the committee, as enlarged, consisted solely of general contractors from the construction industry (App. 1d), despite letters from the Executive Manager of the National Roofing Contractors Association (App. 1e) protesting the lack of roofing subcontractors on the committee, and from the President of the American Subcontractors Association (App. 1f) protesting the lack of representation of "the subcontractors who actually perform the construction work . . ."

The membership of the committee, at the time of the April 5, 1972 meeting, at the time of the July 26, 1972 public hearing, at the time of the September 13, 1972 advisory committee meeting, and at the time the standard under review was promulgated by the Secretary, November 29, 1972, included no roofing contractors of any kind.

The standard under review was promulgated by rule by the Assistant Secretary of Labor for Occupational Safety and Health on November 29, 1972, and published on December 2, 1972, in the Federal Register

(37 F.R. 24712) (App. 1b) with the Secretary's comments.

Petitioners, National Roofing Contractors Association, which represents a substantial part nationwide of the contractors in the roofing industry, and Circle Roofing Company, De Vries Roofing & Siding Company, Palisade Roofing Co., and Henry Reuter Sons, Inc., residents of the territorial jurisdiction of the Seventh Circuit, filed their Petition for Review of the regulation as adversely affected parties on January 26, 1973. The Court of Appeals' jurisdiction is based upon 29 U.S.C. § 655(f) (1970). The Court of Appeals, Circuit Judge Pell dissenting, denied the Petition for Review on April 30, 1974, holding that, absent a showing of specific prejudice suffered by petitioners, the regulation at issue was not invalid for failure of the Secretary of Labor to appoint a roofing contractor to the Advisory Committee. The Court also held that the substance of the regulation was supported by substantial evidence in the record considered as a whole and that the regulation did not deny petitioners and others similarly situated due process and equal protection of the law.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals in the decision below stated that "[i]t is not sufficient to charge that because a roofing subcontractor is not appointed to the [advisory] committee [appointed and consulted by the Secretary], petitioners are *ipso facto* prejudiced." The

court concluded that "[a]bsent a showing of 'specific prejudice' suffered by petitioners, we see no substance in the contention urged by petitioners that failure to appoint a representative of the roofing industry violated § 656(b)". (App. at 3a, 4a).

Implicit in the Court's holding are two conclusions of law: (1) that the terms "employers involved" and "qualified by experience and affiliation" as used in the Occupational Safety and Health Act are broad and general in nature and, in the context of the present case, roofing contractors were not the "employers involved"; and (2) that even if roofing contractors were the "employers involved" and the Secretary completely disregarded 29 U.S.C. § 656(b) by failing to appoint representatives of the roofing industry, the Secretary's order emanating therefrom is not thereby rendered invalid in the absence of a showing that Petitioners were specifically prejudiced by the Secretary's violation. The Court of Appeals, in sum, has affirmed the Secretary's complete disregard of the language of the Act and then gone even further in requiring Petitioners to show specific prejudice in order to be entitled to relief from the Secretary's blatant violation of the law.

As to the first holding and conclusion, Petitioners contend that this involves an extremely important question of law which has not been previously settled by this Court, but which goes to the very heart of the purposes underlying the Occupational Safety and Health Act: the adoption of safety regulations which are so framed as to both afford adequate protection to employees and permit reasonable and feasible compliance by employers and thus encourage voluntary

compliance by employers, both aspects of the regulations being of equal stature under the scheme of the Act. As to the second holding, Petitioners contend that this conclusion is in conflict in principle with several decisions of other Court of Appeals and the decision of this Court in the case of *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33 (1952).

## I.

### THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING ADMINISTRATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The decision by the Court of Appeals upholds the Secretary of Labor's action in completely disenfranchising roofing contractors and their representatives of their right to have representation in the rule-making process under the Act. As Circuit Judge Pell said in his dissenting opinion in the court below, no matter how laudable the purpose of the Act to assure the American working man "safe and healthful working conditions", the application of the Act "as manifested and its potential enforcement as implicit in the present case, presents a frightening prospect to employers who are not necessarily any less interested in the safety of their employees than the employees themselves." (App. 9a). Rather than furthering the laudable purposes underlying the Act, the action of the Secretary in the present case

clearly inhibits the fulfillment of the more specific goals of developing the best standards possible and obtaining employer compliance therewith by allowing and even encouraging the participation by employers in the standards-making process.

The Secretary has been empowered by OSHA to make laws prohibiting conduct traditionally thought criminal in our society by regulations, 29 U.S.C. §§ 654-55 (1970), and to enforce these regulations without search warrants, 29 U.S.C. § 657 (1970), and without affording the citizen employer his rights to due process and to a jury trial by his peers, 29 U.S.C. § 659 (1970). The Secretary is empowered to issue citations and self-executing penalties, and the burden is on the citizen to seek a hearing on the citations and penalties in order to prove himself innocent. 29 U.S.C. § 659 (1970). The citizen's only recourse is to appeal to the Occupational Safety and Health Review Commission, which, although nominally independent, is part of the same enforcement structure. Only after a decision by the Commission is a citizen given a limited right of appeal to an appellate court. 29 U.S.C. § 660 (1970). There is a "chilling effect" on the employer's rights to contest because the Occupational Safety and Health Review Commission has taken the position that it can increase an employer's penalty if he chooses to contest. *See, e.g., Secretary of Labor v. Hidden Valley Corp. of Va.*, OSHRC Docket No. 11 (Feb. 8, 1972). The Commision actually does increase penalties in some 20 per cent of all contested cases. And an election to appeal to a court—or even to seek an initial hearing—involves a substantial risk, in that a $1,000.00

per day penalty may accrue for each day that the employer is appealing. 29 U.S.C. § 666(d) (1970).

While OSHA's enforcement procedures are not before this Court, they are called to the attention of the Court in view of the holding of the Court of Appeals which results in a complete disenfranchisement of the roofing and subcontracting industries at an important stage in the development of the regulations which can then be so harshly applied to those same employers. Their only possible input into this onerous enforcement system, through representation on the Construction Safety Advisory Committee, has been denied them and all other employers similarly situated by the Secretary's failure to legally constitute this committee.

Furthermore, pursuant to the Secretary's policy that priorities for setting standards would include a "target industry program, aimed at industries with injury frequency rates significantly above the all-industry average",[2] the roofing and sheet metal industry was named as one of the first five target industries by the Secretary.[3] Roofing Subcontractors became highly concerned with the development of standards in their industry because of this action by the Secretary. Accordingly, roofing contractors were most desirous of having a representative of their industry on the Construction Safety Advisory Committee, were greatly amazed that such action was not taken, and voiced

[2]Remarks of Secretary of Labor J.D. Hodgson at the White House, March 19, 1972, United States Department of Labor Release No. 71-166, 1 CCH *Employment Safety and Health Guide* ¶1027 (1971).

[3]United States Department of Labor Release No. 71-287, 2 CCH *Employment Safety and Health Guide* ¶8008 (1971).

extreme and continuous objections to the Secretary's failure to carry out his statutory responsibility in this regard.

Judge Pell correctly emphasized in his dissenting opinion the extemely important point that "the roofers can scarcely be said to be some minuscular segment of the construction syndrome . . . [T]hey play a major part in the construction." (App. 11a). It was Judge Pell's contention, and it is Petitioners' primary contention, that the Secretary must be held to the strict requirements of the Act in his appointments to the advisory committee in order to prevent the disenfranchisement of a whole industry, such as the roofing industry herein, and the clearly deficient and irrational regulations which predictably would, and have, resulted from this gross error.

Roofing subcontractors, in the case of the standard here under review, are the "employers involved" whose "viewpoint" is required to be represented in the committee by persons qualified by "experience" *and* "affiliation". Every one of the persons representing construction employers on the committee, at all times pertinent to the promulgation of the standard under review, were affiliated with general contracting firms. It is impossible for them to adequately represent the viewpoint of the roofing subcontractors affected by this standard, within the meaning of the statute, because the roofing subcontractor is the person or firm who actually does the roofing work on any project. The general contractor hires out the roofing work and does none of this work with his own employees and materials.

In addition, Judge Pell correctly pointed out in his dissent the fallacy of the Secretary's argument that because general contractors must absorb the *cost* of any safety devices used by roofing subcontractors, general contractors are thus qualified to represent the viewpoint of roofing contractors because they have the same "interests". As Judge Pell stated, "[t]he simple fact is that, insofar as it is humanly possible to do so, both the general contractor and the subcontractor will pass along any increased costs to the ultimate consumer." (App. 10a). Therefore, the similar "interests" of the subcontractor and general contractor do not satisfy in any way the statutory requirement that the subcontractor's representative be qualified by "experience" and "affiliation".

In the context of construction contracting, the general contractor is in a position distinctly adverse to that of a roofing subcontractor. It would be a contradiction in terms to conclude that a general contractor was "affiliated" in any manner with a subcontractor. The Congress recognized this basic fact that all employers could not be represented by just any employer on ad hoc advisory committees. Instead of providing simply that the composition of the committee should include a number of employer representatives, Congress provided that the employers "involved" be represented, and that they be represented by individuals qualified by experience *and* affiliation to present the viewpoint of the employers involved.

Legislative history of OSHA shows that the Congress intended that employers affected by particular standards should be directly represented on any advisory

committee considering standards involving their industry by persons "qualified by experience and affiliation" in their industry. Although the Senate Report on the bill which became OSHA stated with regard to section 7(b) only that any advisory committee "may include employer and employee representatives in equal numbers," *S. Rep. No.* 91-1282, 91st Cong., 2nd Sess. (1970) *U.S. Code Cong. & Admin. News,* p. 5207 (1970), thus not elucidating to any significant degree what the Congress intended by the term "representative," the Report did shed light on the problem in its comments on the National Advisory Committee established by § 7(a), 29 U.S.C. § 656(a) (1970).

It was stated in the Report that the National Advisory Committee "had an important role to perform in bringing continuing public attention and interest to bear on the Act and on its programs. Its membership should be chosen with great care and should be widely representative." *U.S. Code Cong. & Admin. News,* p. 5207 (1970). The committee membership was to be "divided between representatives of management, labor and occupational safety and health professions . . ."[4] If the major function of this committee is to be informing the public about OSHA, and the draftsmen of OSHA were concerned that its members should be "widely

[4]The Secretary has not even complied with this clear congressional mandate, according to the American Society of Safety Engineers in a recent letter to the Secretary. In the letter, ASSE Managing Director Wayne C. Christensen charged that the Secretary's recent appointment of members to represent the safety profession are not representative of the profession, but in fact "ignore the safety profession" and are "in violation of the Occupation Safety and Health Act". 4 *Occupational Safety and Health Reporter* 291-92 (BNA, August 15, 1974).

representative," then it is clear that the Congress must have intended the same scrupulousness to be applied in choosing the members of the "ad hoc" committees[5] (as the Senate Report denominated them) which bear the much more serious responsibility of recommending the adoption of standards which would properly implement OSHA.

The appointment solely of general contractors to the Construction Safety Advisory Committee to consider standards affecting only roofing subcontractors, in the face of vigorous objection by roofing subcontractors, is patently in abrogation of the responsibility thrust upon the Secretary by the Congress in § 7(b) of OSHA. In the case at bar, the viewpoint of the petitioners, roofing subcontractors and representatives thereof, members of a large and clearly definable industry in itself, cannot be said to have been represented by these general contractors in the proceedings leading to the adoption of this standard which so directly affects their business.

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[5]The Secretary argued that he could not be expected to appoint a representative of each subcontracting "sub-group affected by a particular standard because such an interpretation would require a new advisory committee for each separate construction safety standard." Judge Pell concluded that "[t]his argument ignores the fact that on this particular standard the roofers were not a sub-group but instead were the only affected employers." (App. 10a, 11a). Moreover, Petitioners contend that language of the Act and the legislative history show that several specific ad hoc advisory committees were intended by Congress, as opposed to the Secretary's apparent contention that only one general advisory committee need be appointed to consider all proposed construction safety standards. Thus, the issues of representation and the Secretary's duties under OSHA which the Court can resolve in this case affect the rights of all construction employers under OSHA.

To uphold the Secretary's position, as the Court of Appeals has done, would completely eviscerate the goal of the Congress to allow participation by affected employers in the standard-setting process in order to make use of their expertise and to encourage their voluntary compliance with the regulations finally adopted. Moreover, the issue of representation involved herein transcends the boundaries of this particular case and the industry involved. The resolution of this issue affects every employer in the United States. If the Secretary can blindly ignore the law and the roofing subcontractors' right to representation on the § 7(b) advisory committee, what is to prevent the Secretary from similarly depriving every employer in the country affected by OSHA his right to representation in the standards-making process? In light of the dramatic effect on their lives and businesses,[6] employers should not be denied the fundamental right of representation in OSHA's rule making procedures, and this Court should grant certiorari in this case in order to assure protection of that right.

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[6]The latest reports show that during the period from July, 1973, through May, 1974, OSHA conducted 71,244 inspections, issued 50,469 citations alleging 268,385 violations of the Act or regulations, and assessed penalties totalling $6,377,080. 4 BNA *Occupational Safety and Health Reporter* 216 (July 25, 1974).

## II.

## THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

Even if the advisory committee consulted by the Secretary in promulgating the regulation here under review did not include representatives of the employers involved, the Secretary argued, and the Court of Appeals held, that Petitioners could not rely on this defect absent a showing of "specific prejudice", citing *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 527-29 (1946).[7]

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[7]Petitioners agree whole-heartedly with Judge Pell's conclusion in his dissenting opinion below that the *Pierce* case is distinguishable on its facts and does not stand for the broad rule of law espoused by the Secretary and the majority opinion below:

> In *Pierce*, two Interstate Commerce Commission proceedings were held on separate applications by the appellants and appellees for certificates of public convenience and necessity for the same route of operation. Two hearings were held, to which each of the litigants were parties. The hearings were held at substantially the same time and place, and each party was represented at each and given full opportunity to present evidence and cross-examine all witnesses. Much of the evidence was applicable to both applications. The error urged and found to be nonprejudicial and thus not a basis for reversal was the Commission's apparent consideration of both records together in deciding each application.
>
> It appears clear in the words of the Court that no prejudice or harm whatsoever could have resulted to either party from this "highly technical objection that the commission, in the final state of forming its judgment, could not in either case take account of what had been

In the present case, the right of representation in government decision-making is at issue. Must "specific prejudice" be shown if a citizen is deprived of his indirect right to participate in such processes by casting his vote at the ballot box? If not, how can "specific prejudice" be required where the government has denied the clear and unambiguous lawful right to direct participation in a specific area of government decision-making?

Could a citzen have forced reapportionment of his state legislature under the "one man, one vote" rule announced in *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny, if he had been required to show "specific prejudice"?[8] Could minority citizens disenfranchised of their voting rights by racially discriminatory governmental practices have gained their rights to the ballot if they had been required to show "specific prejudice"?

By parity of reasoning, roofing subcontractors should not have to show "specific prejudice" from being excluded from their only participation and representative input in the OSHA standards-making procedure which both governs their work and expressly guarantees them this representative input. The Court of Appeals for the District of Columbia Circuit has unequivocally declared in the case of *D.C. Federation of Civic*

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done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. The contention in its farthest reach amounts to a legal version of the scriptual injunction against letting one's right hand know what one's left hand may be doing." 327 U.S. at 529 (App. 11a, 12a).

[8]The Court did require the plaintiffs in *Baker v. Carr* to show "a personal stake in the outcome of the controversy" in order to have standing to sue, but standing and such a "personal stake" by the Petitioners in the present case has not even been in issue.

*Association, Inc. v. Volpe,* 434 F.2d 436 (D.C. Cir. 1970), that "the right of effective participation in the political process 'is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government' " [citing *Reynolds v. Sims,* 377 U.S. 533, 555 (1964)] *Id.* at 441.

Other Courts of Appeals have held in several cases that specific prejudice need not be shown where the statutory violation by an administrative agency was "presumptively prejudicial," *Public Utility District No. 1 v. F.P.C.,* 242 F.2d 672, 682 (9th Cir. 1957), in clear violation of "Congressional concern," *D.C. Federation of Civic Assns. v. Volpe, supra* at 441, or "clearly disruptive of the legislative scheme." *Bd. of Public Instruction of Taylor County, Fla. v. Finch,* 414 F.2d 1068 (5th Cir. 1969).

In *D.C. Federation of Civic Assns., Inc. v. Volpe, supra,* the court held that the public hearing required by law before state-built federally financed highway projects can be built was a manifestation of:

> ". . . Congressional concern that highway planners be directly and publicly confronted with opposing views, to ensure that the planners take close account of the objections and desires of individual citizens affected by the proposed projects during the planning process.
>
> Given this expression of legislative intent, we cannot say that this right of citizen participation in the highway planning process is an unimportant right, easily to be discarded.
>
> . . . Public hearings are the forum ordained by Congress in which citizens . . . participate in highway planning decisions. The Supreme Court has made it clear in a series of cases that the right of

> effective participation in the political process "is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." [footnote omitted] 434 F.2d at 441.

The Congress, in adopting OSHA, expressed the same concern for the need and the right of the employers affected by safety standards to be involved in their development and promulgation, through membership on the ad hoc advisory committees appointed to assist the Secretary. These rights are clearly within the realm of "the right of effective participation in the political process" deemed so important by the D.C. Court of Appeals.

Moreover, the Court of Appeals for the District of Columbia Circuit made it clear in *Calvert Cliffs' Coord. Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), that a congressional mandate (in the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* (1970)) requiring federal agencies to give "environmental consideration 'to the fullest extent possible' [to particular agency actions] sets a high standard for the agencies" to be rigorously enforced by the courts; such a mandate does not by its "vagueness" leave such "consideration" to the discretion of the agency. 449 F.2d at 1114. Similarly, the Secretary's duty under OSHA to appoint to ad hoc advisory committees representatives of "employers involved" does not allow him the discretion to define "employers involved" as generally as he deems necessary or to appoint anyone as such a representative no matter how remotely he is affiliated with the employers involved or how little experience he has with the problems addressed by the proposed regulations.

Petitioners contend that the decision below is patently contradictory to the principles and reasoning espoused by the Court of Appeals in the *Public Utility District No. 1, D.C. Federation of Civic Assns., Bd. of Public Instruction of Taylor County, Fla.*, and *Calvert Cliffs' Coord. Comm.* cases and, therefore, should be reviewed to resolve the conflict in the Circuits on this important issue of administrative law.

In addition, the decision below on this issue is also in irreconcilable conflict with decisions of this Court. In *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952), relied upon by the court in *Public Utility District No. 1. v. F.P.C., supra*, in which the objection urged as invalidating the agency's action was a defect in the appointment of a hearing examiner, *id.* at 35, this Court held that had the objection been timely raised, it would have been "an *irregularity* which would *invalidate a resulting order*. . ." *Id.* at 38 (emphasis added).

The failure to appoint representative members to the advisory committee consulted by the Secretary in this case is closely analogous to the defective appointment of the hearing examiner in the *Tucker Truck Lines* case, and the decision in the present case should not be allowed to stand in light of the holding in the *Tucker Truck Lines case*. As this Court has stated,

> Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem *inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute*. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to

> agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. *But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."* American Ship Building Co. v. National Labor Relations Board, 380 U.S., at 318, 85 S.Ct., at 967.

*N.L.R.B. v. Brown*, 380 U.S. 278, 291-92 (1965) (emphasis added).

Moreover, it is obvious from the record that Petitioners and all other roofing subcontractors were prejudiced by the Secretary's action in this case. The industry standard from which the Secretary's regulation was drawn set a minimum height of twenty (20) feet at which catch platforms would be required. Industry, and the Secretary's representative as well, favored this height in proposals before the Advisory Committee. Nevertheless, the unrepresentative committee, lacking expertise in the area, adopted and recommended an arbitrary figure of sixteen (16) feet. The Court of Appeals avoided reaching the issue of the roofing contractor's right to representation by accepting the Secretary's wholly artificial argument that Petitioners had not shown "specific prejudice." For this reason, this Court should grant certiorari in order to resolve the conflict among the circuits on this important issue of fundamental law which is so crucial to individual and corporate citizens whose lives and businesses are ever increasingly governed by government bureaucracy.

## III.

## THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT GUARANTEEING DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AMENDMENT.

Petitioners contended in the court below that the standard under review was violative of their Due Process rights in two respects. First, an almost identical, but more lenient, regulation[9] was promulgated by the Secretary in the "general industry" OSHA regulations which apply to the same circumstances and operations as does the "construction" regulation challenged by these Petitioners. For this reason, the employers to which the "construction" regulation is applied, including the Petitioners, are discriminated against in violation of this Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), which made the concept of equal protection of the law applicable to this unjustifiable discrimination by the federal government.

On the basis of the Secretary's argument that this discrimination is a result of a rational "one step at a time" approach to safety problems, the court below held that the discrimination was not invidious, citing *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). The defect in this reasoning is that the "safety problems" addressed by both regulations are identical: protection of roofers during roofing operations.

Therefore, the Secretary's contention that the failure to conform the regulations is a "step" which has simply

[9] 29 C.F.R. § 1910.28(s)(3) (1974).

not yet been taken in the process of formulating standards applicable to different safety problems does not amount to the rational justification required by this Court's decisions. If the discrimination "is not reasonably related to any proper governmental objective, . . . it imposes [on the persons discriminated against] a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." *Bolling v. Sharpe, supra,* at 500. The standard here reviewed should be held void as in violation of Fifth Amendment due process, becuase it arbitrarily discriminates against employers in the construction industry and in favor of employers outside the construction industry, who are subjected only to the more lenient standard found in 29 C.F.R. § 1910.28(s)(3) (1974).

The second way in which this regulation is in violation of Due process is in its vagueness and unintelligibility. It fails to make clear what is meant by the term "parapet", which is an alternative means of protection under the regulation. Judge Pell, in his dissenting opinion in the court below, agreed completely with Petitioner's contentions on this issue:

> During oral argument, Government counsel observed that the temporary parapet had been included in the standard "although they do not make it as tidy as it was before they were included. They have been included for economic considerations to provide builders *who are willing to take the risk of satisfying compliance officers* by building their own safety devices a chance to do so."
>
> The majority opinion also adverts to this phase of the case in a frame of reference of employers

using "ingenuity in providing less costly alternatives which *could* qualify."

It appears to me that it should be beyond dispute that no standard of conduct should be so vague and uncertain as that which has now resulted where a substantial part of the economy has the Hobson's choice of alternatives, one being one with which they say they cannot live economically and the other being of the calculated risk or chance type.

This is particularly true when we examine the present statute. Without parsing OSHA, it is fair to say that it empowers a federal government inspector to arrive unannounced, inspect a business, and summarily impose fines which can be as much as $1000 for each violation of a safety standard. The statute in application becomes frightening when it is realized that the employer who chooses to use "a temporary device constructed on a sloped roof" is in compliance or in violation dependent upon the individual inspector's judgment as to whether the device is a parapet. Webster's definitional "low wall or similar barrier . . . to protect the edge of a . . . roof . . . or other structure" may prove challenging to the employer who is a devotee of Russian roulette but scarcely seems to equate with what the Secretary stated at the time he promulgated the standard as hereinbefore quoted.

In view of the fact that both civil and criminal penalties may be imposed under OSHA for violation of the standard, it should, to meet due process requirements, clearly warn what conduct is prohibited or required. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled

to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). (App. 14a, 15a) (emphasis Judge Pell's).

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

# In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973

No. 73-1082

NATIONAL ROOFING CONTRACTORS ASSOCIATION, CIRCLE ROOFING COMPANY, DE VRIES ROOFING & SIDING COMPANY, PALISADE ROOFING CO., and HENRY REUTER SONS, INC.,

*Petitioners,*

*v.*

PETER J. BRENNAN, SECRETARY OF LABOR,

*Respondent.*

Petition for Review of an Order of the Secretary of Labor.

ARGUED OCTOBER 29, 1973 — DECIDED APRIL 30, 1974

Before KILEY, *Senior Circuit Judge,* PELL and SPRECHER, *Circuit Judges.*

KILEY, *Senior Circuit Judge.* Petitioners,[1] representatives of employers in the roofing industry, filed their

[1] Petitioners are an association of roofing contractors and individual roofers. The roofing and sheet metal industry was selected one of five "target industries" of the Occupational Safety and Health Act because in 1969 its record was 43 disabling work accidents per one million man hours as compared to 14.8 injuries for all manufacturing enterprises.

petition in this court, pursuant to 29 U.S.C. §655(f),[2] to set aside a safety standard promulgated by respondent Secretary, acting by virtue of §6(a) and (b) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §651, *et seq.*, to protect workers on sloping roofs of buildings. We deny the petition.

OSHA is the "first comprehensive effort by the federal government to regulate safety and health conditions in the workplace."[3] In enacting OSHA Congress stated that the purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. §651(b).

The Secretary was authorized in OSHA, §651(b)(3), to set mandatory standards for safety and health of employees. In promulgating the standard before us he followed the statutory procedures in §655(b). Briefly stated, those procedures are as follows: When the Secretary receives or develops information upon which he determines a standard is needed, he may request recommendations from an advisory committee appointed by him. He then submits his proposal and the information he has received or developed to the committee. Upon receiving the committee's recommendations, he publishes the proposed standard and affords interested persons an opportunity to submit written data or comments.

Should objections be made to the proposal, and upon a request for a hearing, the Secretary is to publish in the Federal Register a notice specifying the proposal and set a time and place for a hearing. After the hearing he "shall" promulgate, or determine not to promulgate, the standard.

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[2] (f) any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

[3] Morey, *The General Duty Clause of the Occupational Safety and Health Act*, 88 Harv. L.R. 988 (1973).

I.

Petitioners contend that the standard is void because the composition of the advisory committee appointed by the Secretary did not comply with the requirement of §656(b) that the committee be representative of employers as well as employees and public representatives.

A.

Section 656(b) provides that any advisory committee appointed by the Secretary shall consist of not more than fifteen members and must include one or more designees of the Secretary of Health, Education and Welfare (HEW); "an equal number of persons qualified by experience and affiliation" to present the views of employers and employees; one or more representatives of state safety and health agencies; and "such other persons as the Secretary may appoint who are qualified by knowledge and experience . . . including one or more representatives of professional organizations of technicians or professionals specializing in occupational safety and health . . ."; but the number of professionals appointed cannot exceed the number appointed as representatives of HEW and state agencies.

Petitioners argue that no roofing industry member was appointed and that general contractors on the committee do not adequately represent them.

The Secretary, before the effective date of OSHA, had exercised his authority under the Construction Work Hours and Safety Standards Act of 1969, 40 U.S.C. §333, *et seq.* (CWHSSA) by appointing a nine-man advisory committee to make recommendations for a safety standard to protect employees working on sloping roofs. After enactment of OSHA he enlarged the committee to the new requirements of fifteen members.

It is not sufficient to charge that because a roofing subcontractor is not appointed to the committee, petitioners are *ipso facto* prejudiced. There is nothing to show that, although roofing contractors may be the group most affected by the standards, general contractors in conjunction with worker representatives and the other representa-

tives are not competent to determine suitable safety standards for employees working on sloping roofs. The testimony does not show that the general contractors prejudiced petitioners' position at the hearing. On the contrary, on this record the interests of the petitioners and the general contractors are plainly the same: general contractors must absorb the cost of safety devices required by the standard and they may be liable for subcontractor violations.[4]

Absent a showing of "specific prejudice" suffered by petitioners, we see no substance in the contention urged by petitioners that failure to appoint a representative of the roofing industry violated §656(b). *United States v. Pierce Auto Lines*, 327 U.S. 515, 527-529 (1946).

B.

Petitioners argue also that the CWHSSA and OSHA advisory committees were improperly composed.[5] We consider this argument frivolous.

As his affidavit before us states, CWHSSA member MacCollum was not appointed as an employer representative as petitioner erroneously contends, but as a public member. And, contrary to petitioner's claim, OSHA committee member Anania, an acting chief of the National Institute of Occupational Safety and Health, was a proper HEW designee. Finally, there is no merit in the claim that the CWHSSA committee had an unequal number of employer and employee representatives. Petitioners' contention that Mr. Burks was a public member is contradicted by a Department of Labor release announcing his appointment as a "management representative."

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[4] OSHA Compliance Operations Manual, Chapters VII, X (1972).

[5] The original advisory committee was formulated under CWHSSA. That the Secretary could temporarily make use of it for his OSHA responsibilities is clear from the Senate Report: "It is the intent of the committee that the Secretary will develop health and safety standards for construction workers covered by Public Law 9-54 [CWHSSA] pursuant to the provisions of that law and that the Secretary will utilize the same mechanisms and resources for the development of health and safety standards for other construction workers newly covered by this act [OSHA]." On August 25, 1972 the nine-member CWHSSA committee was expanded to the fifteen-member OSHA committee.

We hold that the standard before us is not void for failure of the Secretary to meet the requirements of 29 U.S.C. §656(b) of OSHA in composing the advisory committee which recommended the standard. None of the cases referred to in petitioners' brief aids them in their contentions.[6]

II.

The challenged safety standard states:

> A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to eaves with a slope greater than 4 inches in 12 inches without a parapet. In width, the platform shall extend 2 feet beyond the protection of the eaves and shall be provided with a guardrail, midrail, and toeboard. This provision shall not apply where employees engaged in work upon such roofs are protected by a safety belt attached to a lifeline.[7]

The "16 feet" height and "4 inches in 12 inches" slope standard departs from the standards previously promulgated by the Secretary of 20 feet for industry in general (the "national consensus")[8] and 10 feet for construction work, and a 3 inches in 12 inches slope requirement.

Petitioners contend that the departure is not supported by "substantial evidence in the record as a whole,"[9] and is "capricious, arbitrary and unreasonable."

Testimony, contentions and arguments, for petitioners at the hearing, and before us, are, first, that the 16 feet

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[6] *Madden v. International Organization, etc.*, 259 F.2d 297 (7th Cir. 1953); *Madden v. Int. Hod Carriers*, 277 F.2d 688 (7th Cir. 1960); *NLRB v. United Brotherhood of Carpenters*, 261 F.2d 166 (7th Cir. 1958); *Pinkett v. United States*, 105 F .Supp. 67 (D. Md. 1952).

[7] 29 C.F.R. 1926.451(u)(3).

[8] Section 655(a): "[T]he Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending 2 years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, . . . unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. . . ."

[9] Section 655(f), Judicial Review, provides: "The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." See *Chicago v. FPC*, 458 F.2d 731, 744-45 (D.C. Cir. 1971); *Associates Industries v. Dept. of Labor*, 2nd Cir. Oct. 4, 1973, No. 73-1978, Slip. Op. 63-64.

height is unnecessary—since overprotection makes workers careless, and less expensive devices are available; is without precedent; and compliance with it is too costly.[10]

The testimony that the 20 feet height was the appropriate standard implies that protection at some height was needed. Whether that should be 20 feet or 10 feet or 16 feet was considered by the committee. The 20 feet standard was rejected for the reason that a safer standard was needed in order to protect against falls from lower roofs which resulted in more serious injuries.[11] The Secretary recognized the factor of cost of catch platforms and left room in his promulgation for "temporary parapets," to be built by contractors, which could qualify under the standard as alternatives to catch platforms. We think this will enable those covered by the standards and sensitive to the costs involved for catch platforms to use ingenuity in providing less costly alternatives which could qualify. Finally, the committee could well have ignored the claim that overprotection makes workers careless.

The fact that the American National Standards Institute (ANSI) adopted the "national consensus" standard of 20 feet, and that several states[12] had adopted the same or greater height standards, is not binding on the Secretary. In fact, OSHA was enacted to supply the protection Congress deemed lacking in state regulations.[13] He is required under §655(a) to determine whether a standard different from the "national consensus" would result in improved safety or health.

Similarly, while a layman would see little difference, perhaps, between a 4 inches and 5 inches in 12 inches slope, it was within the Secretary's discretion to choose the more gentle slope. As one committee member stated, "You can work on a 4 inch roof. You get up to 5 inches or 6 inches and this is real tough."

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[10] Written comments were aimed at the cost of making catch platforms which would range upward of $750.00 and in some instances exceed the cost of the roofing.

[11] The purpose of the 16 feet level was to include two-story buildings and exclude single-story buildings. 37 Fed. Register 27599, Dec. 16, 1972.

[12] Including New York, Connecticut, Rhode Island and New Jersey.

[13] Comment, *The Occupational Safety and Health Act*, 34 La. L.R. 102 (1973).

Petitioners also argue that safety belts, which can be used in place of scaffolds, are dangerous, since ropes purporting to hold the workers safely have caused tripping of employees and more injuries than that protection prevented. The committee properly recognized the self-serving element implicit in this argument and cited the experience of iron workers who originally resisted safety belts but have come gradually to accept them as effective safety equipment.

Finally, petitioners argue that the majority of injuries to employees engaged in roofing were due not to the lack of adequate safety protection but to negligence of workers, and that catch platforms in preventing falls could cause greater injury than the falls, and that the best protection against employee injury was efficiency on the part of employers and due care on the part of employees. Apparently the committee found, as we find, this argument unpersuasive. There is no showing in the statistics to bear out the first argument with respect to the negligence of workers, no convincing testimony that catch platforms would cause greater injuries, and the statistics would seem to indicate that employers have not performed their part in providing effective equipment for their employees.[14]

The committee knew of the 273 fatal or near-fatal falls from roofs in one year from sloping, and even flat, roofs caused by holes therein, tripping on loose shingles, or the weather, as well as the high injury rate among roofing and sheet metal workers.

An abundant record of oral and written statements, statistics, and testimony underlies the Secretary's standard. As previously noted, the advisory committee is made up of representatives of employers, employees, technical and professional organizations, and state agencies, and the HEW designate. Reading the transcript of the committee's final meeting has satisfied us that the committee members understood and considered the oral and

[14] In early 1970, "[p]rivate industry and state regulation were not doing an adequate job of insuring health and safety in the workplace." Gross, *Occupational Safety and Health Act: Much Ado about Something*, 3 Loyola Univ. L.J., 247, 249 (1972).

written testimony at the hearing and were well informed about the petitioners' viewpoints and about what safety standards were reasonable. The fundamental issue for the committee was whether the 16 feet height, 4 inches in 12 inches slope, or the 20 feet height, 5 inches in 12 inches slope, was appropriate to protect employees. We conclude that there is "substantial evidence in the record as a whole" to support the standard promulgated by the Secretary, *Chicago v. FPC*, 458 F.2d 731, 744-45 (D.C. Cir. 1971), and that the standard is not "capricious" or "arbitrary."

## III.

Finally, petitioners contend that the challenged standard is unconstitutionally void in violation of their equal protection and due process rights and because of the standard's vagueness. There is no merit in the contention.

Petitioners argue that the 16 feet height standard before us—with potential civil and criminal liabilities attached for its violations[15]—applied to the construction industry is more restrictive than the 20 feet standard applied to employers outside the construction industry[16]; that the standard bears no rational relationship to the purpose of OSHA; and that the discrimination is so unjustifiable as to violate due process under *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Under the applicable regulations, the 16 feet standard covers all "substantial" roofing work, including "work for construction, alteration and/or repairs including painting and decorating."[17] While we are not persuaded by the Secretary's argument that because 1926.451(u)(3) covers construction work, and 1910.28(s)(3) covers maintenance work, the former is more dangerous, we agree with his argument that all persons doing the same kind of work on roofs are subjected to the 16 feet standard; that he addresses safety problems "by one step at a time"; and that his failure to apply that standard to the varying situations at this time is not a basis for a claim of invidious discrimination.

[15] 29 U.S.C. §666.

[16] 29 C.F.R. 1910.28(s)(3).

[17] 29 C.F.R. 1910.12(b).

We therefore hold that the Secretary did not deny due process to the roofing industry by not applying the 16 feet standard at this time to the roofing maintenance industry. A rational "one step at a time" approach defeats a constitutional claim. *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). What the Secretary has done here is to select one phase of the construction industry for a remedial standard. He may have passed over, temporarily, another phase of the industry, but that neglect is not a denial of constitutional rights.

We need not discuss petitioners' claim that the standard is so "vague and unintelligible" to those in the industry as to deny them due process. A reading of the testimony and oral statements in the record is sufficient to convince us that the standard is neither.

For the reasons given, the petition is DENIED.

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PELL, *Circuit Judge*, dissenting.

The Occupational Safety and Health Act of 1970 (OSHA), brought into being for the laudable purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions," nevertheless, in its application as manifested and its potential enforcement as implicit in the present case, presents a frightening prospect to employers who are not necessarily any less interested in the safety of their employees than the employees themselves. Accordingly, I respectfully dissent.

As an initial matter, it appears to me that the majority opinion errs in upholding a standard which followed consideration of the subject matter by an advisory committee on which there was no person "qualified by experience and *affiliation*" to represent the involved employers, roofing subcontractors, as the statute clearly required. (Emphasis added.)

I find it no answer to say that there were general contractors on the advisory committee and that their interests are the same as the roofing subcontractors because the general contractors must absorb the cost of safety

devices. The simple fact is that, insofar as it is humanly possible to do so, both the general contractor and the subcontractor will pass along any increased costs to the ultimate consumer.[1] Since the standard adopted will affect very few commercials or industrial buildings the prime recipient of the increased costs will be the home builders. It will be they who will be "sensitive to the costs."

I do not conceive that it was contemplated that OSHA would eliminate all accidents arising from the construction of roofs. The "so far as possible" proviso makes that clear. The only solution for an *in toto* eradication of such accidents would be a complete prohibition against anyone working on roofs, but I do not envisage that the veneration paid in the American dream to a roof over one's head is to be so lightly cast aside.

At oral argument, Government counsel stated that while there are no directions anywhere in the Act for taking economic considerations in view, there are suggestions that the standards must be feasible and as a matter of fact in promulgating the standards there had been an effort to take economic considerations in view.

The petitioners fail to perceive that this was accomplished in the case of the present standard and contend, correctly in my opinion, that they were prejudiced by not having representatives of their employer group on the advisory committee.

The cost factor enters the picture in another aspect in that the Secretary argues that "section 7(b) cannot reasonably be read to require a representative from each sub-group affected by a particular standard because such an interpretation would require a new advisory committee for each separate construction safety standard." This argument ignores the fact that on this particular standard

[1] The petitioners point out that the written comments received by the Secretary of Labor suggested that the cost on a residential roofing job would be increased by anywhere from 25% to 100% or more if catch platforms are required. These letters further suggested that since most "legitimate" roofing companies would bid on this basis, homeowners would probably reject their bids and contract with "jack leg" roofers who could do the job for less because they would ignore the catch platform requirement. To this extent, of course, the roofing subcontractors are subject to a different economic impact than that of the general contractors.

the roofers were not a sub-group but instead were the only affected employers.

Further, the roofers can scarcely be said to be some minuscular segment of the construction syndrome. They are not the craftsmen who come to the residence under construction to deliver and install the thermostat or telephone; they play a major part in the construction. Also, they occupy a significant part in the safety picture. As the Government concedes, the Secretary established priorities for setting standards which include "a target industry program aimed at industries with injury frequency rates significantly above the all industry average." The Secretary designated the roofing and sheet metal industry as one of the first five such target industries, yet he put not a single representative with affiliation with the employer group on the advisory committee.

The majority opinion accepts the Government position that the petitioners cannot raise the present issue absent a showing of specific prejudice, citing *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 527-529 (1946).

In *Pierce*, two Interstate Commerce Commission proceedings were held on separate applications by the appellants and appellees for certificates of public convenience and necessity and necessity for the same route of operation. Two hearings were held, to which each of the litigants were parties. The hearings were held at substantially the same time and place, and each party was represented at each and given full opportunity to present evidence and cross-examine all witnesses. Much of the evidence was applicable to both applications. The error urged and found to be nonprejudicial and thus not a basis for reversal was the Commission's apparent consideration of both records together in deciding each application.

It appears clear in the words of the Court that no prejudice or harm whatsoever could have resulted to either party from this "highly technical objection that the Commission, in the final state of forming its judgment, could not in either case take account of what had

been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. The contention in its farthest reach amounts to a legal version of the scriptual injunction against letting one's right hand know what one's left hand may be doing." 327 U.S. at 529.

The basis of judicial review of most administrative rulings has been well stated by Judge Will in *Elgin, Joliet & Eastern Ry. v. Benj. Harris & Co.*, 245 F. Supp. 467, 472 (N.D. Ill. 1965):

> "The authority of an administrative agency is delineated by the terms of the statutory grant. The responsibility for construing the statutory authority rests with the judiciary. Hence, an inquiry to determine if the agency has exceeded its statutory power is a constitutional obligation of the courts. The refusal to apply the agency ruling upon finding that the bounds laid down by Congress have been traversed is not based on evidentiary insufficiency or disagreement with expert judgment, but is an exercise of judicial authority to preserve the legislative scheme." Quoted with approval in *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1074-5 (5th Cir. 1969).

In the present case, of course, by virtue of explicit congressional language there is a sufficiency of evidence problem as "the determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. §655(f).[2]

In my opinion, the prejudice is implicit when that which the legislation required, *i.e.*, employer-affiliated representatives, was given no recognition. In sum, it

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[2] In its brief filed in this appeal, the Government argued at length that the plain words of the statute did not mean what they purported to say, in view of the informal rule-making procedures involved and the legislative history. The Secretary's position in this respect was undercut by post-brief decisions, *Associated Industries of New York State, Inc. v. United States Department of Labor*, 487 F.2d 342 (2d Cir. 1973); *Dry Color Mfrs. Ass'n, Inc. v. Department of Labor*, 486 F.2d 98 (3d Cir. 1973); and *Florida Peach Growers Ass'n, Inc. v. United States Department of Labor*, .... F.2d .. (5th Cir. 1974).

The Secretary also presented the argument, the logic of which escapes me, that even if his "determinations" had to be supported by substantial evidence this did not mean that his "Rule" had to be so supported.

appears to me that the petitioners have put the matter correctly in arguing that "the promulgation of OSHA standards by the Secretary with an Advisory Committee on which the affected employers are not represented is 'clearly disruptive of the legislative scheme' [citing *Board of Public Instruction, supra*] to encourage and perfect occupational safety and health programs and practices and provide their employees with a safe and healthful working environment."

Inasmuch as I consider the most serious vice in the present proceedings to be the nebulosity of the standard actually adopted in view of the drastic enforcement potential of OSHA, I will not tarry long on the matter of sufficiency of the evidence although it appears that what happened was that the advisory committee recommended a compromise figure which was utilized by the Secretary. I find a paucity of relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

I do note the following specific matters on the sufficiency question. Of the falls from roofs which had been reported, a substantial number had nothing to do with the pitch of the roof, *e.g.*, falls resulting when a workman backs off a roof while using power equipment or those resulting from falling through holes in the roof.[3] At first blush, I would have little sympathy with the petitioners' arguments about the dangers created by safety belts since they apparently were not too concerned about this provision if the roof height of 20 feet had been adopted. However, this lack, if the 20 foot level were adopted, does not mean that the safety belt alternative could be safely utilized, or even that it would ever be utilized since another standard, 29 C.F.R. §1926.104 (1972), requires the line to be anchored or secured to a structural member so as to be capable of supporting a dead weight of 5400 pounds. The significant factor on the saftey belts is that I find

[3] The expertise of the advisory committee hopefully was not exemplified by the statement on the slope matter by one of the committee members: "a friend of mine said, who has done a good deal of this, he said, 4 is really not bad but he said 5, particularly if it is a little damp, he said, 'I would not want to be working up there without some kind of protection.'"

no evidence that other than cursory attention was given to these as a practical alternative to the catch platform.

What appears to me to be the most persuasive basis for remanding and requiring a new standard to be promulgated is not what was included but what was omitted. Evidence indicated that toeboards with safety jacks or cleats were the normal and best safety devices and could be utilized at a reasonable cost. Yet, at the public hearing in July 1972, a member of the Department of Labor Office of Solicitor observed that this was "something which at least I was not aware of, and it doesn't seem all that unreasonable."

In promulgating his final standard the Secretary adverted to the toeboard possibility as follows:

> "At the hearing a contention was made that in certain circumstances a temporary device constructed on a sloped roof could form an economical and equally safe alternative to a catch platform. To the extent that such devices can be said to constitute secure temporary parapets, they may qualify as an acceptable means of protection. Such a solution requires no amendment to the standards as they already permit parapets as an alternative to catch platforms."

During oral argument, Government counsel observed that the temporary parapet had been included in the standard "although they do not make it as tidy as it was before they were included. They have been included for economic considerations to provide builders *who are willing to take the risk of satisfying compliance officers* by building their own safety devices a chance to do so." (Emphasis added.)

The majority opinion also adverts to this phase of the case in a frame of reference of employers using "ingenuity in providing less costly alternatives which *could* qualify." (Emphasis added.)

It appears to me that it should be beyond dispute that no standard of conduct should be so vague and uncertain as that which has now resulted where a substantial part of the economy has the Hobson's choice of alternatives, one

being one with which they say they cannot live economically and the other being of the calculated risk or chance type.

This is particularly true when we examine the present statute. Without parsing OSHA, it is fair to say that it empowers a federal government inspector to arrive unannounced, inspect a business, and summarily impose fines which can be as much as $1000 for each violation of a safety standard. The statute in application becomes frightening when it is realized that the employer who chooses to use "a temporary device constructed on a sloped roof" is in compliance or in violation dependent upon the individual inspector's judgment as to whether the device is a parapet. Webster's definitional "low wall or similar barrier . . . to protect the edge of a . . . roof . . . or other structure" may prove challenging to the employer who is a devotee of Russian roulette but scarcely seems to equate with what the Secretary stated at the time he promulgated the standard as hereinbefore quoted.

In view of the fact that both civil and criminal penalties may be imposed under OSHA for violation of the standard, it should, to meet due process requirements, clearly warn what conduct is prohibited or required. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

In final analysis, it appears to me that because OSHA thrusts upon the Secretary the responsibility of seeing to it that every working person is provided with safe working conditions in a country with an infinite variety of occupations exposed to possible injury hazards, the Secretary is confronted with a monumental task. Mistakes in determinations during the early period of the responsibility would not only be possible but because of the widespread range of responsibility not unlikely. This would be true despite the fact that the states for some years by legislation and regulation have prescribed rules the purpose of which was to achieve safe working conditions. In addition to direct state action, safety guidelines have been provided by the American National Stan-

dards Institute. It is not surprising, and indeed is suggested by the record here, that a natural human impulse, not totally lacking in logic, would come into play by those not possessed of particularized expertise, viz., that Congress has apparently been of the opinion that federal legislation is needed in the present area not only to achieve uniformity in controlling laws but in making working conditions safer generally than they now are, so we will therefore take the present requirements, whatever they may be, and make them more stringent. It, of course, should not have necessarily followed that in any given area the existing requirements were inadequate.

In view of the multiplicity of problems and their broad range in many differing and complex contexts, it should have been particularly necessary that the advisory committees be, by virtue of the composition expressed by Congress, prepared to bring an expertise not here possessed to bear on the differing problems.

The cases are replete with references to the deference if not reverence to be accorded to administrative expertise. However, administrative expertise should partake of something more explicable and supportable than Eleusinian mysteries. The uncertainty interjected into the enforcement process by the parapet reference necessitates in my opinion setting aside and vacating the order of the Secretary and remanding for consideration by a properly constituted advisory committee to be followed by promulgation of a new standard realizing the maximum safety of working conditions consistent with the realities of feasibility and enforceability.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

USCA 4061—The Scheffer Press, Inc., Chicago, Illinois—4-30-74—225

## APPENDIX B

FEDERAL REGISTER,
Vol. 37, No. 233—December 2, 1972

# PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

## Scaffolding Generally and Pump Jack Scaffolding and Roof Catch Platforms

Proceedings with respect to the above subjects were commenced by notice published in the FEDERAL REGISTER on June 7, 1972 (37 F.R. 11340). The notice concerned: (1) A proposed increase in the height after which guardrails, midrails, and toeboards on scaffolding are required: (2) permitting the use of pump jack scaffolds subject to specific requirements; and (3) requirements for roof catch platforms. The proposals largely reflected the recommendations of the Advisory Committee on Construction Safety and Health.

The regulations to which the changes were proposed have application under the Construction Safety Act (40 U.S.C. 33) and the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.).

The notice of proposed rule making invited interested persons to submit written data, views, and arguments concerning the proposed changes and a hearing was held on July 26, 1972.

The certified record of the hearing, the written comments received as well as staff suggestions were submitted to the Advisory Committee on Construction Safety and Health for its review and advice pursuant to 29 CFR 1911.18. The Advisory Committee has considered this material and has submitted its recommendation to the Assistant Secretary for Occupational Safety and Health for decision.

The major issues for decision are:

1. Whether the height after which guardrails, midrails, and toeboards for scaffolds are required should be raised from 6 feet to 10 feet;

2. Whether the height after which catch platforms must be used below sloped roofs should be raised from 10 feet to 16 feet or some greater height and whether this requirement should continue to apply to slopes greater than three in 12 or should be changed to apply only to some greater slope; and

3. Whether the use of pump jack scaffolds should be permitted and if so under what conditions.

Having considered carefully all written and oral comments contained in the record and having reviewed the views of the Advisory Committee, these issues are discussed and decided as follows:

• • •

2. Catch platforms. Under the notice of proposed rule making the height above which catch platforms are required was raised from 10 feet to 16 feet. Because the occupational safety and health standard for general industry employments is set at 20 feet, it has been contended that in the interest of uniformity this level should be applied to construction as well. The Advisory Committee pointed out, however, that the 16-foot level provides a more practical dividing line for the construction industry as it will generally apply the obligation to the building of structures that exceed one story while in most circumstances will relieve builders of single-story structures. Their recommendation is therefore adopted.

The requirements for catch platforms apply where the slope of a roof exceeds 3 inches in 12 inches without a parapet. The greatest number of comments indicated the belief that this slope did not present any significant danger of falling. Accordingly, the Committee has recom-

mended and I have decided to adopt a standard of 4 inches in 12 inches without a parapet.

At the hearing a contention was made that in certain circumstances a temporary device constructed on a sloped roof could form an economical and equally safe alternative to a catch platform. To the extent that such devices can be said to constitute secure temporary parapets, they may qualify as an acceptable means of protection. Such a solution requires no amendment to the standards as they already permit parapets as an alternative to catch platforms.

• • •

Accordingly, the amendments as proposed are hereby adopted subject to changes in § 1926.451 (u) (3), (x) (6) (iii), and (y) based upon the findings set forth above. As these amendments will result in relieving restrictions they shall become effectively immediately.

Signed at Washington, D.C., this 29th day of November 1972.

G. C. Guenther,
Assistant Secretary of Labor.

§ 1926.451 Scaffolding.

• • •

(u) *Roofing brackets.* • • •

(3) A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to eaves with a slope greater than 4 inches in 12 inches without a parapet. In width, the platform shall extend 2 feet beyond the protection of the eaves and shall be provided with a guardrail, midrail, and toeboard. This provision shall not apply where employees engaged in work upon such roofs are protected by a safety belt attached to a lifeline.

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# APPENDIX C
## Public Law 91-596
## 91st Congress, S. 2193
## December 29, 1970

# An Act



To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Occupational Safety and Health Act of 1970".

Occupational Safety and Health Act of 1970.

### CONGRESSIONAL FINDINGS AND PURPOSE

SEC. (2) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) The term "Secretary" mean the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this Act.

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested

and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.

(11) The term "Committee" means the National Advisory Committee on Occupational Safety and Health established under this Act.

(12) The term "Director" means the Director of the National Institute for Occupational Safety and Health.

(13) The term "Institute" means the National Institute for Occupational Safety and Health established under this Act.

(14) The term "Workmen's Compensation Commission" means the National Commission on State Workmen's Compensation Laws established under this Act.

APPLICABILITY OF THIS ACT

SEC. 4. (a) This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this Act by the courts established for areas in which there are no United States district courts having jurisdiction. 67 Stat. 462. 43 USC 1331 note.

(b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 73 Stat. 688.

(2) The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts. 49 Stat. 2036. 79 Stat. 1034. 83 Stat. 96. 72 Stat. 835. 79 Stat. 845; Ante, p. 443.

(3) The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws. Report to Congress.

(4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

DUTIES

SEC. 5. (a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

OCCUPATIONAL SAFETY AND HEALTH STANDARDS

80 Stat. 381; 81 Stat. 195. 5 USC 500.

SEC. 6. (a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this Act, the Secretary may request the recommendations of an advisory committee appointed under section 7 of this Act. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

Advisory committee, recommendations.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission. Publication in Federal Register.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing. Hearing, notice. Publication in Federal Register.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired. Toxic materials.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as Temporary variance order.

practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

Notice, hearing.

Renewal.

Time limitation.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health, Education, and Welfare certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health, Education, and Welfare designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

Labels, etc.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

Protective equipment, etc.

Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In

addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health, Education, and Welfare, may by rule promulgated pursuant to section 553 of title 5, United States Code, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

Medical examinations.

80 Stat. 383.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

Publication in Federal Register.

(c)(1) The Secretary shall provide, without regard to the requirements of chapter 5, title 5, United States Code, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

Temporary standard. Publication in Federal Register. 80 Stat. 381; 81 Stat. 195. 5 USC 500.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

Time limitation.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with section 6(b) of this Act, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they

Variance rule.

differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

Publication in Federal Register.

(e) Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

Petition for judicial review.

(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health, Education, and Welfare regarding the need for mandatory standards in determining the priority for establishing such standards.

ADVISORY COMMITTEES; ADMINISTRATION

Establishment; membership.

SEC. 7. (a)(1) There is hereby established a National Advisory Committee on Occupational Safety and Health consisting of twelve members appointed by the Secretary, four of whom are to be designated by the Secretary of Health, Education, and Welfare, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and composed of representatives of manangement, labor, occupational safety and occupational health professions, and of the public. The Secretary shall designate one of the public members as Chairman. The members shall be selected upon the basis of their experience and competence in the field of occupational safety and health.

80 Stat. 378. 5 USC 101.

(2) The Committee shall advise, consult with, and make recommendations to the Secretary and the Secretary of Health, Education, and Welfare on matters relating to the administration of the Act. The Committee shall hold no fewer than two meetings during each calendar year. All meetings of the Committee shall be open to the public and a transcript shall be kept and made available for public inspection.

Public transcript.

(3) The members of the Committee shall be compensated in accordance with the provisions of section 3109 of title 5, United States Code.

80 Stat. 416.

(4) The Secretary shall furnish to the Committee an executive secretary and such secretarial, clerical, and other services as are deemed necessary to the conduct of its business.

(b) An advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 6 of this Act. Each such committee shall consist of not more than fifteen members

and shall include as a member one or more designees of the Secretary of Health, Education, and Welfare, and shall include among its members an equal number of persons qualified by experience and affiliation to present the viewpoint of the employers involved, and of persons similarly qualified to present the viewpoint of the workers involved, as well as one or more representatives of health and safety agencies of the States. An advisory committee may also include such other persons as the Secretary may appoint who are qualified by knowledge and experience to make a useful contribution to the work of such committee, including one or more representatives of professional organizations of technicians or professionals specializing in occupational safety or health, and one or more representatives of nationally recognized standards-producing organizations, but the number of persons so appointed to any such advisory committee shall not exceed the number appointed to such committee as representatives of Federal and State agencies. Persons appointed to advisory committees from private life shall be compensated in the same manner as consultants or experts under section 3109 of title 5, United States Code. The Secretary shall pay to any State which is the employer of a member of such a committee who is a representative of the health or safety agency of that State, reimbursement sufficient to cover the actual cost to the State resulting from such representative's membership on such committee. Any meeting of such committee shall be open to the public and an accurate record shall be kept and made available to the public. No member of such committee (other than representatives of employers and employees) shall have an economic interest in any proposed rule. 80 Stat. 416. Recordkeeping

(c) In carrying out his responsibilities under this Act, the Secretary is authorized to—

(1) use, with the consent of any Federal agency, the services, facilities, and personnel of such agency, with or without reimbursement, and with the consent of any State or political subdivision thereof, accept and use the services, facilities, and personnel of any agency of such State or subdivision with reimbursement; and

(2) employ experts and consultants or organizations thereof as authorized by section 3109 of title 5, United States Code, except that contracts for such employment may be renewed annually; compensate individuals so employed at rates not in excess of the rate specified at the time of service for grade GS-18 under section 5332 of title 5, United States Code, including traveltime, and allow them while away from their homes or regular places of business, travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently, while so employed. Ante, p. 198-1. 80 Stat. 499; 83 Stat. 190.

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

SEC. 8. (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Subpoena power.

(b) In making his inspections and investigations under this Act the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Recordkeeping.

(c)(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health, Education, and Welfare, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health, Education, and Welfare, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards.

Work-related deaths, etc.; reports.

(2) The Secretary, in cooperation with the Secretary of Health, Education, and Welfare, shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(3) The Secretary, in cooperation with the Secretary of Health, Education, and Welfare, shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 6. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 6, and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Any information obtained by the Secretary, the Secretary of Health, Education, and Welfare, or a State agency under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

(e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

(f)(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(g)(1) The Secretary and Secretary of Health, Education, and Welfare are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section. Reports, publication.

(2) The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment. Rules and regulations.

CITATIONS

SEC. 9. (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

Limitation.

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

PROCEDURE FOR ENFORCEMENT

SEC. 10. (a) If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days

of the issuance of a citation under section 9(a), any employee or representative of employees files notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection. 80 Stat. 384.

JUDICIAL REVIEW

SEC. 11. (a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evi- 72 Stat. 941; 80 Stat. 1323.

dence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code. Petitions filed under this subsection shall be heard expeditiously.

62 Stat. 928.

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies.

(c) (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Establishment; membership.

SEC. 12. (a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason

of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

Terms.

(b) The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

80 Stat. 460.

(c)(1) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(57) Chairman, Occupational Safety and Health Review Commission."

Ante, p. 776.

(2) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(94) Members, Occupational Safety and Health Review Commission."

Location.

(d) The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

(e) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.

5 USC 5101, 5331.

Ante, p. 198-1.

Quorum.

(f) For the purpose of carrying out its functions under this Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

Public records.

(g) Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

28 USC app.

(h) The Commission may order testimony to be taken by deposition in any proceedings pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) For the purpose of any proceeding before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission.

61 Stat. 150; Ante, p. 930.

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(j) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Except as otherwise provided in this Act, the hearing examiners shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5, United States Code. Each hearing examiner shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5, United States Code.

Stat. 453.

te, p. 198-1.

PROCEDURES TO COUNTERACT IMMINENT DANGERS

SEC. 13. (a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

(b) Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this Act. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.

USC app.

(c) Whenever and as soon as an inspector concludes that conditions or practices described in subsection (a) exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought.

(d) If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary in the United States district court for the district in which the imminent danger is alleged to exist or the employer has its principal office, or for the District of Columbia, for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate.

REPRESENTATION IN CIVIL LITIGATION

SEC. 14. Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act but all such litigation shall be subject to the direction and control of the Attorney General. 80 Stat. 613.

CONFIDENTIALITY OF TRADE SECRETS

SEC. 15. All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this Act which contains or which might reveal a trade secret referred to in section 1905 of title 18 of the United States Code shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. 62 Stat. 791.

VARIATIONS, TOLERANCES, AND EXEMPTIONS

SEC. 16. The Secretary, on the record, after notice and opportunity for a hearing may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper to avoid serious impairment of the national defense. Such action shall not be in effect for more than six months without notification to affected employees and an opportunity being afforded for a hearing.

PENALTIES

SEC. 17. (a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $10,000 for each violation.

(b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation.

(d) Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $1,000 for each day during which such failure or violation continues.

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

65 Stat. 721; 79 Stat. 234.

(h)(1) Section 1114 of title 18, United States Code, is hereby amended by striking out "designated by the Secretary of Health, Education, and Welfare to conduct investigations, or inspections under the Federal Food, Drug, and Cosmetic Act" and inserting in lieu thereof "or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions".

62 Stat. 756.

(2) Notwithstanding the provisions of sections 1111 and 1114 of title 18, United States Code, whoever, in violation of the provisions of section 1114 of such title, kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions added to such section 1114 by paragraph (1) of this subsection, and who would otherwise be subject to the penalty provisions of such section 1111, shall be punished by imprisonment for any term of years or for life.

(i) Any employer who violates any of the posting requirements, as prescribed under the provisions of this Act, shall be assessed a civil penalty of up to $1,000 for each violation.

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(l) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

STATE JURISDICTION AND STATE PLANS

SEC. 18. (a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary rejects a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing. Notice of hearing.

(e) After the Secretary approves a State plan submitted under subsection (b), he may, but shall not be required to, exercise his authority under sections 8, 9, 10, 13, and 17 with respect to comparable standards promulgated under section 6, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the

State plan, that the criteria set forth in subsection (c) are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c). Upon making the determination referred to in the preceding sentence, the provisions of sections 5(a)(2), 8 (except for the purpose of carrying out subsection (f) of this section), 9, 10, 13, and 17, and standards promulgated under section 6 of this Act, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 9 or 10 before the date of determination.

Continuing evaluation.

(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

Plan rejection, review.

(g) The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28, United States Code. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

72 Stat. 941; 80 Stat. 1323.

62 Stat. 928.

(h) The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from the date of enactment of this Act, whichever is earlier.

FEDERAL AGENCY SAFETY PROGRAMS AND RESPONSIBILITIES

SEC. 19. (a) It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6. The head of each agency shall (after consultation with representatives of the employees thereof)—

(1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 6;

(2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;

(3) keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action; Recordkeeping.

(4) consult with the Secretary with regard to the adequacy as to form and content of records kept pursuant to subsection (a)(3) of this section; and

(5) make an annual report to the Secretary with respect to occupational accidents and injuries and the agency's program under this section. Such report shall include any report submitted under section 7902(e)(2) of title 5, United States Code. Annual report. 80 Stat. 530.

(b) The Secretary shall report to the President a summary or digest of reports submitted to him under subsection (a)(5) of this section, together with his evaluations of and recommendations derived from such reports. The President shall transmit annually to the Senate and the House of Representatives a report of the activities of Federal agencies under this section. Report to President. Report to Congress.

(c) Section 7902(c)(1) of title 5, United States Code, is amended by inserting after "agencies" the following: "and of labor organizations representing employees".

(d) The Secretary shall have access to records and reports kept and filed by Federal agencies pursuant to subsections (a) (3) and (5) of this section unless those records and reports are specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy, in which case the Secretary shall have access to such information as will not jeopardize national defense or foreign policy. Records, etc.; availability.

RESEARCH AND RELATED ACTIVITIES

SEC. 20. (a)(1) The Secretary of Health, Education, and Welfare, after consultation with the Secretary and with other appropriate Federal departments or agencies, shall conduct (directly or by grants or contracts) research, experiments, and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques, and approaches for dealing with occupational safety and health problems.

(2) The Secretary of Health, Education, and Welfare shall from time to time consult with the Secretary in order to develop specific plans for such research, demonstrations, and experiments as are necessary to produce criteria, including criteria identifying toxic substances, enabling the Secretary to meet his responsibility for the formulation of safety and health standards under this Act; and the Secretary of Health, Education, and Welfare, on the basis of such research, demonstrations, and experiments and any other information available to him, shall develop and publish at least annually such criteria as will effectuate the purposes of this Act.

(3) The Secretary of Health, Education, and Welfare, on the basis of such research, demonstrations, and experiments, and any other information available to him, shall develop criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are safe for various periods of employment, including but not limited to the exposure levels at which no employee will suffer impaired health or functional capacities or diminished life expectancy as a result of his work experience.

(4) The Secretary of Health, Education, and Welfare shall also conduct special research, experiments, and demonstrations relating to occupational safety and health as are necessary to explore new problems, including those created by new technology in occupational safety and health, which may require ameliorative action beyond that

which is otherwise provided for in the operating provisions of this Act. The Secretary of Health, Education, and Welfare shall also conduct research into the motivational and behavioral factors relating to the field of occupational safety and health.

Toxic substances, records.

(5) The Secretary of Health, Education, and Welfare, in order to comply with his responsibilities under paragraph (2), and in order to develop needed information regarding potentially toxic substances or harmful physical agents, may prescribe regulations requiring employers to measure, record, and make reports on the exposure of employees to substances or physical agents which the Secretary of Health, Education, and Welfare reasonably believes may endanger the health or safety of employees. The Secretary of Health, Education, and Welfare also is authorized to establish such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses. Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. Upon the request of any employer who is required to measure and record exposure of employees to substances or physical agents as provided under this subsection, the Secretary of Health, Education, and Welfare shall furnish full financial or other assistance to such employer for the purpose of defraying any additional expense incurred by him in carrying out the measuring and recording as provided in this subsection.

Medical examinations.

Toxic substances, publication.

(6) The Secretary of Health, Education, and Welfare shall publish within six months of enactment of this Act and thereafter as needed but at least annually a list of all known toxic substances by generic family or other useful grouping, and the concentrations at which such toxicity is known to occur. He shall determine following a written request by any employer or authorized representative of employees, specifying with reasonable particularity the grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found; and shall submit such determination both to employers and affected employees as soon as possible. If the Secretary of Health, Education, and Welfare determines that any substance is potentially toxic at the concentrations in which it is used or found in a place of employment, and such substance is not covered by an occupational safety or health standard promulgated under section 6, the Secretary of Health, Education, and Welfare shall immediately submit such determination to the Secretary, together with all pertinent criteria.

Annual studies.

(7) Within two years of enactment of this Act, and annually thereafter the Secretary of Health, Education, and Welfare shall conduct and publish industrywide studies of the effect of chronic or low-level exposure to industrial materials, processes, and stresses on the potential for illness, disease, or loss of functional capacity in aging adults.

Inspections.

(b) The Secretary of Health, Education, and Welfare is authorized to make inspections and question employers and employees as provided in section 8 of this Act in order to carry out his functions and responsibilities under this section.

Contract authority.

(c) The Secretary is authorized to enter into contracts, agreements, or other arrangements with appropriate public agencies or private organizations for the purpose of conducting studies relating to his responsibilities under this Act. In carrying out his responsibilities

under this subsection, the Secretary shall cooperate with the Secretary of Health, Education, and Welfare in order to avoid any duplication of efforts under this section.

(d) Information obtained by the Secretary and the Secretary of Health, Education, and Welfare under this section shall be disseminated by the Secretary to employers and employees and organizations thereof.

(e) The functions of the Secretary of Health, Education, and Welfare under this Act shall, to the extent feasible, be delegated to the Director of the National Institute for Occupational Safety and Health established by section 22 of this Act. Delegation of functions.

TRAINING AND EMPLOYEE EDUCATION

SEC. 21. (a) The Secretary of Health, Education, and Welfare, after consultation with the Secretary and with other appropriate Federal departments and agencies, shall conduct, directly or by grants or contracts (1) education programs to provide an adequate supply of qualified personnel to carry out the purposes of this Act, and (2) informational programs on the importance of and proper use of adequate safety and health equipment.

(b) The Secretary is also authorized to conduct, directly or by grants or contracts, short-term training of personnel engaged in work related to his responsibilities under this Act.

(c) The Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall (1) provide for the establishment and supervision of programs for the education and training employers and employees in the recognition, avoidance, and prevent of unsafe or unhealthful working conditions in employments covered by this Act, and (2) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.

NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

SEC. 22. (a) It is the purpose of this section to establish a National Institute for Occupational Safety and Health in the Department of Health, Education, and Welfare in order to carry out the policy set forth in section 2 of this Act and to perform the functions of the Secretary of Health, Education, and Welfare under sections 20 and 21 of this Act. Establishment.

(b) There is hereby established in the Department of Health, Education, and Welfare a National Institute for Occupational Safety and Health. The Institute shall be headed by a Director who shall be appointed by the Secretary of Health, Education, and Welfare, and who shall serve for a term of six years unless previously removed by the Secretary of Health, Education, and Welfare. Director, appointment, term.

(c) The Institute is authorized to—

(1) develop and establish recommended occupational safety and health standards; and

(2) perform all functions of the Secretary of Health, Education, and Welfare under sections 20 and 21 of this Act.

(d) Upon his own initiative, or upon the request of the Secretary or the Secretary of Health, Education, and Welfare, the Director is authorized (1) to conduct such research and experimental programs as he determines are necessary for the development of criteria for new and improved occupational safety and health standards, and (2) after

consideration of the results of such research and experimental programs make recommendations concerning new or improved occupational safety and health standards. Any occupational safety and health standard recommended pursuant to this section shall immediately be forwarded to the Secretary of Labor, and to the Secretary of Health, Education, and Welfare.

(e) In addition to any authority vested in the Institute by other provisions of this section, the Director, in carrying out the functions of the Institute, is authorized to—

(1) prescribe such regulations as he deems necessary governing the manner in which its functions shall be carried out;

(2) receive money and other property donated, bequeathed, or devised, without condition or restriction other than that it be used for the purposes of the Institute and to use, sell, or otherwise dispose of such property for the purpose of carrying out its functions;

(3) receive (and use, sell, or otherwise dispose of, in accordance with paragraph (2)), money and other property donated, bequeathed, or devised to the Institute with a condition or restriction, including a condition that the Institute use other funds of the Institute for the purposes of the gift;

(4) in accordance with the civil service laws, appoint and fix the compensation of such personnel as may be necessary to carry out the provisions of this section;

(5) obtain the services of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code;

80 Stat. 416.

(6) accept and utilize the services of voluntary and noncompensated personnel and reimburse them for travel expenses, including per diem, as authorized by section 5703 of title 5, United States Code;

83 Stat. 190.

(7) enter into contracts, grants or other arrangements, or modifications thereof to carry out the provisions of this section, and such contracts or modifications thereof may be entered into without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), or any other provision of law relating to competitive bidding;

(8) make advance, progress, and other payments which the Director deems necessary under this title without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U.S.C. 529); and

(9) make other necessary expenditures.

Annual report to HEW, President, and Congress.

(f) The Director shall submit to the Secretary of Health, Education, and Welfare, to the President, and to the Congress an annual report of the operations of the Institute under this Act, which shall include a detailed statement of all private and public funds received and expended by it, and such recommendations as he deems appropriate.

GRANTS TO THE STATES

SEC. 23. (a) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 18 to assist them—

(1) in identifying their needs and responsibilities in the area of occupational safety and health,

(2) in developing State plans under section 18, or

(3) in developing plans for—

(A) establishing systems for the collection of information concerning the nature and frequency of occupational injuries and diseases;

(B) increasing the expertise and enforcement capabilities of their personnel engaged in occupational safety and health programs; or

(C) otherwise improving the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this Act.

(b) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States for experimental and demonstration projects consistent with the objectives set forth in subsection (a) of this section.

(c) The Governor of the State shall designate the appropriate State agency for receipt of any grant made by the Secretary under this section.

(d) Any State agency designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary.

(e) The Secretary shall review the application, and shall, after consultation with the Secretary of Health, Education, and Welfare, approve or reject such application.

(f) The Federal share for each State grant under subsection (a) or (b) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 18 of this Act. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) shall be applicable in determining the Federal share under this subsection.

(h) Prior to June 30, 1973, the Secretary shall, after consultation with the Secretary of Health, Education, and Welfare, transmit a report to the President and to the Congress, describing the experience under the grant programs authorized by this section and making any recommendations he may deem appropriate. Report to President and Congress.

STATISTICS

SEC. 24. (a) In order to further the purposes of this Act, the Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. Such program may cover all employments whether or not subject to any other provisions of this Act but shall not cover employments excluded by section 4 of the Act. The Secretary shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(b) To carry out his duties under subsection (a) of this section, the Secretary may—

(1) promote, encourage, or directly engage in programs of studies, information and communication concerning occupational safety and health statistics;

(2) make grants to States or political subdivisions thereof in order to assist them in developing and administering programs dealing with occupational safety and health statistics; and

(3) arrange, through grants or contracts, for the conduct of such research and investigations as give promise of furthering the objectives of this section.

(c) The Federal share for each grant under subsection (b) of this section may be up to 50 per centum of the State's total cost.

(d) The Secretary may, with the consent of any State or political subdivision thereof, accept and use the services, facilities, and employees of the agencies of such State or political subdivision, with or without reimbursement, in order to assist him in carrying out his functions under this section.

Reports.

(e) On the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act.

(f) Agreements between the Department of Labor and States pertaining to the collection of occupational safety and health statistics already in effect on the effective date of this Act shall remain in effect until superseded by grants or contracts made under this Act.

AUDITS

SEC. 25. (a) Each recipient of a grant under this Act shall keep such records as the Secretary or the Secretary of Health, Education, and Welfare shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant is made or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(b) The Secretary or the Secretary of Health, Education, and Welfare, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients of any grant under this Act that are pertinent to any such grant.

ANNUAL REPORT

SEC. 26. Within one hundred and twenty days following the convening of each regular session of each Congress, the Secretary and the Secretary of Health, Education, and Welfare shall each prepare and submit to the President for transmittal to the Congress a report upon the subject matter of this Act, the progress toward achievement of the purpose of this Act, the needs and requirements in the field of occupational safety and health, and any other relevant information. Such reports shall include information regarding occupational safety and health standards, and criteria for such standards, developed during the preceding year; evaluation of standards and criteria previously developed under this Act, defining areas of emphasis for new criteria and standards; an evaluation of the degree of observance of applicable occupational safety and health standards, and a summary

of inspection and enforcement activity undertaken; analysis and evaluation of research activities for which results have been obtained under governmental and nongovernmental sponsorship; an analysis of major occupational diseases; evaluation of available control and measurement technology for hazards for which standards or criteria have been developed during the preceding year; description of cooperative efforts undertaken between Government agencies and other interested parties in the implementation of this Act during the preceding year; a progress report on the development of an adequate supply of trained manpower in the field of occupational safety and health, including estimates of future needs and the efforts being made by Government and others to meet those needs; listing of all toxic substances in industrial usage for which labeling requirements, criteria, or standards have not yet been established; and such recommendations for additional legislation as are deemed necessary to protect the safety and health of the worker and improve the administration of this Act.

NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS

SEC. 27. (a) (1) The Congress hereby finds and declares that—

(A) the vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation; and

(B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.

(2) The purpose of this section is to authorize an effective study and objective evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment.

(b) There is hereby established a National Commission on State Workmen's Compensation Laws. Establishment.

(c) (1) The Workmen's Compensation Commission shall be composed of fifteen members to be appointed by the President from among members of State workmen's compensation boards, representatives of insurance carriers, business, labor, members of the medical profession having experience in industrial medicine or in workmen's compensation cases, educators having special expertise in the field of workmen's compensation, and representatives of the general public. The Secretary, the Secretary of Commerce, and the Secretary of Health, Education, and Welfare shall be ex officio members of the Workmen's Compensation Commission: Membership.

(2) Any vacancy in the Workmen's Compensation Commission shall not affect its powers.

(3) The President shall designate one of the members to serve as Chairman and one to serve as Vice Chairman of the Workmen's Compensation Commission.

uorum. (4) Eight members of the Workmen's Compensation Commission shall constitute a quorum.

tudy. (d)(1) The Workmen's Compensation Commission shall undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation. Such study and evaluation shall include, without being limited to, the following subjects: (A) the amount and duration of permanent and temporary disability benefits and the criteria for determining the maximum limitations thereon, (B) the amount and duration of medical benefits and provisions insuring adequate medical care and free choice of physician, (C) the extent of coverage of workers, including exemptions based on numbers or type of employment, (D) standards for determining which injuries or diseases should be deemed compensable, (E) rehabilitation, (F) coverage under second or subsequent injury funds, (G) time limits on filing claims, (H) waiting periods, (I) compulsory or elective coverage, (J) administration, (K) legal expenses, (L) the feasibility and desirability of a uniform system of reporting information concerning job-related injuries and diseases and the operation of workmen's compensation laws, (M) the resolution of conflict of laws, extraterritoriality and similar problems arising from claims with multistate aspects, (N) the extent to which private insurance carriers are excluded from supplying workmen's compensation coverage and the desirability of such exclusionary practices, to the extent they are found to exist, (O) the relationship between workmen's compensation on the one hand, and old-age, disability, and survivors insurance and other types of insurance, public or private, on the other hand, (P) methods of implementing the recommendations of the Commission.

port to esident d Congress. (2) The Workmen's Compensation Commission shall transmit to the President and to the Congress not later than July 31, 1972, a final report containing a detailed statement of the findings and conclusions of the Commission, together with such recommendations as it deems advisable.

arings. (e)(1) The Workmen's Compensation Commission or, on the authorization of the Workmen's Compensation Commission, any subcommittee or members thereof, may, for the purpose of carrying out the provisions of this title, hold such hearings, take such testimony, and sit and act at such times and places as the Workmen's Compensation Commission deems advisable. Any member authorized by the Workmen's Compensation Commission may administer oaths or affirmations to witnesses appearing before the Workmen's Compensation Commission or any subcommittee or members thereof.

(2) Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, is authorized and directed to furnish to the Workmen's Compensation Commission, upon request made by the Chairman or Vice Chairman, such information as the Workmen's Compensation Commission deems necessary to carry out its functions under this section.

(f) Subject to such rules and regulations as may be adopted by the Workmen's Compensation Commission, the Chairman shall have the power to—

Stat. 378. SC 101. (1) appoint and fix the compensation of an executive director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule

SC 5101, 1.

pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title, and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

Ante, p. 198-1.

80 Stat. 416.

(g) The Workmen's Compensation Commission is authorized to enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

Contract authorization.

(h) Members of the Workmen's Compensation Commission shall receive compensation for each day they are engaged in the performance of their duties as members of the Workmen's Compensation Commission at the daily rate prescribed for GS-18 under section 5332 of title 5, United States Code, and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties as members of the Workmen's Compensation Commission.

Compensation; travel expenses.

(i) There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

Appropriation.

(j) On the ninetieth day after the date of submission of its final report to the President, the Workmen's Compensation Commission shall cease to exist.

Termination.

ECONOMIC ASSISTANCE TO SMALL BUSINESSES

SEC. 28. (a) Section 7(b) of the Small Business Act, as amended, is amended—

72 Stat. 387; 83 Stat. 802. 15 USC 636.

(1) by striking out the period at the end of "paragraph (5)" and inserting in lieu thereof "; and"; and

(2) by adding after paragraph (5) a new paragraph as follows:

"(6) to make such loans (either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred basis) as the Administration may determine to be necessary or appropriate to assist any small business concern in effecting additions to or alterations in the equipment, facilities, or methods of operation of such business in order to comply with the applicable standards promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 or standards adopted by a State pursuant to a plan approved under section 18 of the Occupational Safety and Health Act of 1970, if the Administration determines that such concern is likely to suffer substantial economic injury without assistance under this paragraph."

(b) The third sentence of section 7(b) of he Small Business Act, as amended, is amended by striking out "or (5)" after "paragraph (3)" and inserting a comma followed by "(5) or (6)".

(c) Section 4(c)(1) of the Small Business Act, as amended, is amended by inserting "7(b)(6)," after "7(b)(5),".

80 Stat. 132. 15 USC 633.

(d) Loans may also be made or guaranteed for the purposes set forth in section 7(b)(6) of the Small Business Act, as amended, pursuant to the provisions of section 202 of the Public Works and Economic Development Act of 1965, as amended.

79 Stat. 556. 42 USC 3142.

ADDITIONAL ASSISTANT SECRETARY OF LABOR

SEC. 29. (a) Section 2 of the Act of April 17, 1946 (60 Stat. 91) as amended (29 U.S.C. 553) is amended by—

75 Stat. 338.

(1) striking out "four" in the first sentence of such section and inserting in lieu thereof "five"; and

(2) adding at the end thereof the following new sentence, "One of such Assistant Secretaries shall be an Assistant Secretary of Labor for Occupational Safety and Health.".

80 Stat. 462. (b) Paragraph (20) of section 5315 of title 5, United States Code, is amended by striking out "(4)" and inserting in lieu thereof "(5)".

ADDITIONAL POSITIONS

SEC. 30. Section 5108(c) of title 5, United States Code, is amended by—

(1) striking out the word "and" at the end of paragraph (8);

(2) striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding immediately after paragraph (9) the following new paragraph:

"(10)(A) the Secretary of Labor, subject to the standards and procedures prescribed by this chapter, may place an additional twenty-five positions in the Department of Labor in GS–16, 17, and 18 for the purposes of carrying out his responsibilities under the Occupational Safety and Health Act of 1970;

"(B) the Occupational Safety and Health Review Commission, subject to the standards and procedures prescribed by this chapter, may place ten positions in GS–16, 17, and 18 in carrying out its functions under the Occupational Safety and Health Act of 1970."

EMERGENCY LOCATOR BEACONS

72 Stat. 775. 49 USC 1421. SEC. 31. Section 601 of the Federal Aviation Act of 1958 is amended by inserting at the end thereof a new subsection as follows:

"EMERGENCY LOCATOR BEACONS

"(d)(1) Except with respect to aircraft described in paragraph (2) of this subsection, minimum standards pursuant to this section shall include a requirement that emergency locator beacons shall be installed—

"(A) on any fixed-wing, powered aircraft for use in air commerce the manufacture of which is completed, or which is imported into the United States, after one year following the date of enactment of this subsection; and

"(B) on any fixed-wing, powered aircraft used in air commerce after three years following such date.

"(2) The provisions of this subsection shall not apply to jet-powered aircraft; aircraft used in air transportation (other than air taxis and charter aircraft); military aircraft; aircraft used solely for training purposes not involving flights more than twenty miles from its base; and aircraft used for the aerial application of chemicals."

SEPARABILITY

SEC. 32. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

APPROPRIATIONS

SEC. 33. There are authorized to be appropriated to carry out this Act for each fiscal year such sums as the Congress shall deem necessary.

EFFECTIVE DATE

SEC. 34. This Act shall take effect one hundred and twenty days after the date of its enactment.

Approved December 29, 1970.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 91-1291 accompanying H.R. 16785 (Comm. on Education and Labor) and No. 91-1765 (Comm. of Conference).
SENATE REPORT No. 91-1282 (Comm. on Labor and Public Welfare).
CONGRESSIONAL RECORD, Vol. 116 (1970):
Oct. 13, Nov. 16, 17, considered and passed Senate.
Nov. 23, 24, considered and passed House, amended, in lieu of H.R. 16785.
Dec. 16, Senate agreed to conference report.
Dec. 17, House agreed to conference report.

## APPENDIX D

[Letterhead of]

U. S. DEPARTMENT OF LABOR
USDL 72-587
Occupational Safety and
Health Administration
Sharkey (202) 961-3914
(Home) (202) 337-3854
For Release: A.M. Editions
Friday, August 25, 1972

### OSHA EXPANDS CONSTRUCTION SAFETY ADVISORY PANEL

The Construction Safety Advisory Committee has been reorganized to increase its membership from 9 to 15 and to provide more balanced representation of affected groups, the Occupational Safety and Health Administration (OSHA) announced today.

George C. Guenther, Assistant Secretary of Labor for Occupational Safety and Health, said the structure of the construction advisory committee now parallels that of the National Advisory Committee on Occupational Safety and Health and is in keeping with amended rules adopted on May 2, 1972, governing the composition of all standards advisory committees.

Under the reorganization, the construction advisory committee includes the following representatives:

Five for employers, five for employees, two for State safety and health agencies, two for technical and professional organizations, and one designated by the Secretary of Health, Education, and Welfare.

Of the nine original members of the advisory committee, seven continue to serve on the new panel. These members and the groups they represent are:

—Technical and professional organizations:

Herman J. Spoerer, Youngstown, Ohio, chairman; G. Edwin Burks, consultant, Peoria, Ill.

—Employers:

George E. Aro, manager of safety, United Engineers and Constructors, Inc., Philadelphia.

—Employees:

Melvin J. Boyle, assistant to the international secretary, International Brotherhood of Electrical Workers, Washington;

Paul Connelley, safety director, United Brotherhood of Carpenters and Joiners, Washington;

Robert M. Farrell, safety director, International Union of Operating Engineers, Countryside, Ill.

—State agencies:

Barry C. Brown, director, Michigan Department of Labor, Lansing, Mich.

The eight new members and the groups they represent are:

—Employers:

Richard L. Daley, director of safety and environmental services, Morrison-Knudsen Company, Inc., Boise, Idaho;

Frederick M. Livingston Jr., corporate safety director, Turner Construction Company, New York City;

Donald E. Ruff, assistant operating manager, Transmission and Distribution, American Electric Power Service Corporation, New York City;

Arthur C. Schwotzer, president, Crossgates, Inc., McMurry, Pa.

—Employees:

Robert E. P. Cooney, general vice president, Iron Workers International Association, Washington;

W. Vernie Reed, first vice president, Laborers' International Union of North America, Washington.

—State agencies:

Ronald McK. Heymann, Commissioner, New Jersey Department of Labor and Industry, Trenton, N. J.

—HEW designee:

Thomas L. Anania, acting chief, Industrial Hygiene Services, National Institute for Occupational Safety and Health, Cincinnati, Ohio.

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## APPENDIX E

[Letterhead of]

NATIONAL ROOFING CONTRACTORS ASSOCIATION
May 9, 1972

Mr. George C. Guenther
Asst. Secretary of Labor for
Occupational Safety and Health
Main Labor Bldg.
Washington, D.C. 20210

Dear Mr. Guenther:

For the past week, I have considered carefully, recommendations that I might make in the way of nominations for membership on the expanded Construction Safety Advisory Committee. After a great deal of thought, I have no specific recommendation to forward to Mr. Gerard F. Scannell.

The Committee is to be composed of five representatives of employers. Using the Webster New World Dictionary, I find that a representative should be one "specifically acting or speaking, especially by due authority, in the place, or on behalf, of another or others;—a person duly authorized to act or speak for another or others". From the roofing industry's point of view, the employer representatives on the Construction Safety Advisory Committee will not solve this particular problem.

You have repeatedly stated that voluntary compliance is necessary to the successful implimentation of the Occupational Safety and Health Act. NRCA has consistently agreed with this premise and has tried to work in a voluntary, cooperative manner with OSHA officials. However, I believe that there is no stronger deterent to voluntary compliance than an obdurate and remote standards organization. It seems to me that you face an impossible task if you are expecting the Construction Safety Advisory Committee to actually represent the various seg-

ments on the construction industry. The ANSI-A10 Committee on construction has thirty-one sub-committees dealing with various sections of construction. As you well know, the construction industry is very broad, very diverse, and I don't believe I need to detail for you the many different kinds of safety stanrards needed for the entire construction industry.

In specific terms, our problem is—who on this committee is accountable to the roofing contractor? Who can we count on to know the problems of the roofing industry? Who will represent the roofing industry in discussions? Please understand my sincerity by realizing that I would be delighted to see a representative of the International Roofers Union appointed to this Committee. However, this still does not solve the problem of finding an individual who is capable of responding to the needs of all of the various elements of construction. In the sub-contracting industries alone you and I can name at least a dozen different types of construction and, therefore, a dozen different types of safety standards that are necessary. I am not suggesting that the ANSI structure be used for the purposes of your Advisory Committee nor am I suggesting that there be no Advisory Committee. Rather, I hope you will give serious consideration to the idea that the Construction Safety Advisory Committee needs to be re-organized on a much broader basis, so that each section of the construction industry can have representation, and can have direct confrontation with the standards that affect the industry. Again, I point out that one of the serious problems we have faced as a national association, is the lack of response on the part of our members due to the fact that they feel we have no representation and no voice in determining the standards under which they must operate.

I am aware that Mr. Scannell will receive a number of nominations for the Advisory Committee from various national associations in the construction industry. I am sure that each man in his own way is well qualified. I am sure that none of these men can represent the roofing industry just as I am sure that none of the nominees that I might send on could represent the electrical industry, the plumbing industry, the painting industry, etc.
As always, we will continue to work toward the goal of providing a safe work place for the workmen in the roofing industry. This would be our mutual goal, and should in my opinion, take precidence over enforcement of rules, development of rules, questions on standards, and hundreds of details that seem sometimes to work in opposition to our stated goals.

Yours very truly,
NRCA
/s/ Fred Good
Fred Good, CAE
Executive Manager

FG:mz

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## APPENDIX F

[Letterhead of]

AMERICAN SUBCONTRACTORS ASSOCIATION

October 10, 1972

Honorable George C. Guenther
Assistant Secretary for Occupational
Safety & Health
U.S. Department of Labor
Occupational Safety and Health
Administration
14th and Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Secretary:

The American Subcontractors Association is a national construction association whose members are subcontractors of all trades. Subcontractors actually perform more than 80% of the total construction in the United States.

On May 22, 1972, Mr. Richard L. Jackson, the Chairman of the Board of the American Subcontractors Association, wrote to Mr. George F. Scannell, Director of the OSHA Office of Standards, pointing out that subcontractors were not represented on the OSHA Construction Safety Advisory Committee and requesting that a member of the American Subcontractors Association be placed on this Advisory Committee. To date, Mr. Jackson has not even received the courtesy of a response.

May I remind you of your responsibility and congressional mandate under Section 7(b) of the Act to be sure that appointments to an Advisory Committee ". . . shall include among its members an equal number of persons qualified by experience and affiliation to present the viewpoint of the employers involved . . ." Apparently you

ignored the fact that subcontractors actually do 80% of the work of the construction industry just as you ignored Mr. Jackson's request for representation. We consider the omission of subcontractors from the Safety Advisory Committee to be a breach of your statutory duty and a serious error in judgment.

It appears that the only representation and involvement that subcontractors have in the Occupational Safety and Health Act is their role as defendants in actions against them.

As you know, public sentiment against this Act is at the boiling point. Employers are hostile toward the Act's enforcement procedures, which are balanced against an employer's opportunity to contest. They are also frustrated by the Act's policies, which are calculated to penalize employers rather than aid them in providing a safe and healthful environment for their employees.

Certainly, compliance with the Occupational Safety and Health Standards for Construction would be more palatable to the subcontractors who actually perform the construction work if they felt that they at least had some minimal representation in the Advisory Committee which recommends the standards that affect them.

I respectfully request reconsideration of the appointments to the OSHA Construction Safety Advisory Committee and request substantial representation of the subcontracting industry.

Very truly yours,

American Subcontractors Association
Robert Palazzo
President

RP/kw